

FINDINGS OF FACT AND CONCLUSIONS OF LAW

For the following reasons, the Appeals Board finds the preliminary hearing Order of the Administrative Law Judge should be affirmed.

Claimant claims she injured her low back at work when she pulled a spool of wire that weighed 75 to 100 pounds out from under her work bench. Claimant alleges the accident occurred on or about June 23, 1998, and claimant continued to work with worsening symptoms until she was taken off work on July 21, 1998. Claimant contends she notified her supervisor, Rick Ulbrich, on the day of the accident that she hurt her back at work. Claimant also testified she told co-workers, Shirley Leayman and Faye Harris, she had hurt her back at work.

The respondent did not provide claimant with any medical treatment. Claimant went on her own to her family physician, Ronald M. Varner, D.O., on June 26, 1998. Dr. Varner had claimant undergo a CT scan which revealed lumbar degenerative disc disease and a herniated disc at L5-S1 on the left. Dr. Varner then referred claimant to orthopedic surgeon Christopher W. Siwek, M.D.

Dr. Siwek took claimant off work on July 21, 1998, and provided her with conservative treatment of physical therapy, strengthening and stretching exercise, pain medication, and an epidural injection. When claimant failed to improve, Dr. Siwek referred claimant to neurosurgeon Eustaquio O. Abay II, M.D.

Dr. Abay saw claimant on August 13, 1998, and had her undergo a myelogram/CT examination. This examination revealed a circumferential disc herniation with persistent filling defect at L2-3 on the left impinging on the L3 nerve root. Also there was what appeared to be a far lateral disc herniation at L5-S1 on the left that maybe was impinging on the L5 nerve root. On September 30, 1998, Dr. Abay performed an L2-3 microdiscectomy on the left and a lateral discectomy at L5-S1 on the left. Dr. Abay took claimant off work until November 26, 1998.

The history claimant gave Dr. Abay was consistent with the description claimant gave of her work related accident during her preliminary hearing testimony. Claimant also related that she had a low back strain in 1982 but had no further low back problems until this work related accident.

At the preliminary hearing, three representatives of the respondent testified before the Administrative Law Judge; Faye Harris, who identified herself as claimant's area supervisor; Roxanne Heit, personnel administrator; and Rick Ulbrich, avionics manger, who at one time supervised claimant. Additionally, respondent offered and the Administrative Law Judge admitted into evidence a sworn affidavit of claimant's co-worker, Shirley Leayman.

Faye Harris, who claimant identified only as a co-worker, testified that claimant did not tell her she had injured her back at work; there was no reason for claimant to move the

spindle of wire on June 23, 1998, because the product that used that specific wire was not scheduled on June 23, 1998; and two employees were required to move the spool of wire.

Shirley Leayman's affidavit stated she had not requested wire from claimant on June 23, 1998, for the purpose of building the anaconda product; wire spools required two employees to move; and claimant never told Ms. Leayman that she had hurt her back at work.

Rick Ulbrich testified claimant did not notify him that she injured her back at work; usually two employees were required to move a spool of wire but one could move it; and a computer printout admitted into evidence indicated that the anaconda product was not scheduled or built on June 23, 1998.

Roxanne Heit testified the first time she was told claimant's back injury was work related was during a telephone conversation she thought, but was not positive, took place on August 5, 1998, between her and the claimant.

Respondent contends that more weight should be given to the testimony of respondent's representatives and Ms. Leayman's affidavit than the testimony of the claimant. Respondent argues that claimant's testimony was inconsistent and completely contradicted by the testimony of the respondent's representatives. In fact, respondent contends the more reasonable explanation for claimant's present back injury is a 1982 automobile accident or an alleged statement Ms. Heit said the claimant related that her back problem was probably from hauling hay when she was a young adult.

At this juncture of these proceedings, the Appeals Board concludes some deference should be given to the Administrative Law Judge because he had the unique opportunity to assess the credibility of all the witnesses. The Administrative Law Judge found claimant's testimony believable when he concluded that her back injury occurred while working for the respondent. Therefore, giving some deference to the Administrative Law Judge, the Appeals Board finds claimant's low back injury did arise out of and in the course of her employment with respondent.

The Administrative Law Judge also found claimant gave respondent timely notice of accident as required by K.S.A. 44-520. In so finding, the Administrative Law Judge had to believe claimant that she told one of her supervisors, Rick Ulbrich, that she injured her back at work on June 23, 1998, the initial date of her accident. Therefore, giving some deference to the Administrative Law Judge, the Appeals Board finds claimant gave respondent timely notice of her accident.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that Administrative Law Judge John D. Clark's October 23, 1998, preliminary hearing Order should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of December 1998.

BOARD MEMBER

c: Robert R. Lee, Wichita, KS
P. Kelly Donley, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director